K-C Machine & Tool Company *and* Raymond Marah. Case 7-CA-20643

29 February 1984

DECISION AND ORDER

BY CHAIRMAN DOTSON AND MEMBERS ZIMMERMAN AND HUNTER

On 14 July 1983 Administrative Law Judge Thomas A. Ricci issued the attached decision. The Charging Party filed exceptions in the form of a letter with attached affidavits.[1]

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions[2] and has decided to affirm the judge's rulings, findings, and conclusions and to adopt the recommended Order.[3]

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, K-C Machine & Tool Company, Detroit, Michigan, its officers, agents, successors, and assigns, shall take the action set forth in the Order.

DECISION

STATEMENT OF THE CASE

THOMAS A. RICCI, Administrative Law Judge: A hearing in this proceeding was held at Detroit, Michigan, on May 18, 1983, on complaint of the General Counsel against K-C Machine & Tool Company, the Respondent or the Company. The complaint issued on June 24, 1982, based on a charge filed on May 10, 1982, by Raymond Marah, the Charging Party. The principal issue of the case is whether Marah was discharged by the Respondent in violation of Section 8(a)(3) of the Act. Briefs were filed by both parties.

On the entire record and from my observation of the witnesses, I make the following

FINDINGS OF FACT

I. THE BUSINESS OF THE RESPONDENT

In the city of Detroit, Michigan, the Respondent is engaged in the precision boring and milling of parts for other companies. During the year ending December 31, 1981, a representative period, in the course of its business it manufactured, sold, and distributed from Detroit products valued in excess of $50,000 which were shipped to points outside the State. I find that the Respondent is engaged in commerce within the meaning of the Act.

II. THE LABOR ORGANIZATION INVOLVED

I find that International Union, United Automobile, Aerospace and Agricultural Implement Workers of America is a labor organization within the meaning of Section 2(5) of the Act.

III. THE UNFAIR LABOR PRACTICES

A. *The Case in Brief*

The substantive issue of this case centers on the layoff of a machine operator: Was he chosen for release because of his known union activity, or was he laid off solely because he had the least seniority in the group when there was an absolute economic necessity to reduce the staff? There are other allegations of violations of Section 8(a)(1) of the Act—threats to close down the business, interrogation of employees, etc. But these are of minor importance here because it was stipulated that the prounion campaign at the time of the events succeeded, and led to a binding contract which was in effect at the time of the hearing. An election petition was filed with the Board on February 23, 1982, an election was held on April 22, the Union won, objections were filed by the Employer, and the Union was certified by the Board on September 16. A contract was then signed.

Raymond Marah, the operator involved here, filed a charge on May 10, saying his layoff on April 29, 1982, constituted a violation of Section 8(a)(3) of the Act. The Respondent contends he was first at the top of the list of operators who had to be laid off because he had the least

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[1] The Charging Party has excepted to the judge's conclusion that his discharge was not in violation of Sec. 8(a)(3) of the Act. We find it unnecessary to decide whether or not his exceptions are drafted with sufficient specificity to satisfy the requirements of Sec. 102.46(b) of the Board's Rules and Regulations because we find them without merit in any event. Chairman Dotson would disregard the "exceptions" because they do not comply with Sec. 102.46(b). Cf. *Fiesta Printing Co.*, 268 NLRB 660 (1984).

[2] No exceptions have been filed to the judge's conclusion that by interrogating employees concerning the signing of union cards and by threatening to close down its business in retaliation for union activities, the Respondent has violated Sec. 8(a)(1) of the Act.

[3] In support of his exceptions, the Charging Party has requested that the record be reopened to include the testimony of four additional witnesses. In a motion to reopen the record, the movant must state briefly "the additional evidence sought to be adduced, why it was not presented previously, and that, if adduced and credited, it would require a different result. Only newly discovered evidence, evidence which has become available only since the close of the hearing, or evidence which the Board believes should have been taken at the hearing will be taken at any further hearing." National Labor Relations Board Rules and Regulations, Sec. 102.48(d)(1). We hereby deny the motion as to the three individuals from whom the Charging Party obtained post-hearing affidavits because there is no showing that they were unavailable to testify at the time of the hearing, are newly discovered, or that any other circumstance exists which would warrant reopening the record under Sec. 102.48(d)(1). For the following two reasons, we also deny the motion as to the intended witness who could not be located at the time of the hearing because she had moved without leaving a forwarding address. First, simply because the Charging Party's efforts to find this individual during the week prior to the hearing were unsuccessful does not render her unavailable within the meaning of Sec. 102.48(d)(1). Second, the Charging Party contends that the proffered witness' explanation of a contradiction in company records will corroborate his testimony that his employer arbitrarily changed his seniority date to provide a pretext for laying him off for his union involvement. A careful reading of his filing reveals that this is mere speculation. We cannot determine what the evidence sought to be adduced will actually be and, thus, if it will shed any light at all on the issues in this case.

seniority of all. Marah had worked for this Company, on and off, since 1963. It is a common occurrence in this plant for employees to quit at times, work elsewhere, and then return. When they do that, their seniority always starts anew on the day of return. Marah had left the Company a number of times, and always his seniority date had been reset as of the day of his return. At the start of 1981, Marah had been working continuously at the Respondent's plant since 1976. Then, in June 1981, he went to work for a company called Viking Tool, closer to his home, for more money, and with a promise of promotion to supervisory status. He did this without telling anyone in management, at the start of an unannounced vacation he was entitled to. Did he quit his employment with the Respondent that day, as his employer now contends, so that he became an operator with much less seniority 11 months later when a layoff became necessary? Restated: Did the Respondent have a right to treat him as a new hire when he quit his new job at Viking, and chose to return here? That is the real question to be decided in this case.

B. *Violations of Section 8(a)(1)*

In early February 1982 the employees started signing union authorization cards; according to Marah's testimony all but two had signed cards by February 15. By letter dated that day the Union advised the Respondent of its majority claim and demanded recognition. The representation petition resulted. On February 18 Al Kacy, the president and owner of the business, met first with the day-shift and then with the night-shift men, and told them there would be a 7-1/2 percent reduction in pay because the Company was in bad straits and losing money. More than one employee spoke up to protest. One of them, Marah, testified he told the manager that day he would go to the Labor Board to inquire whether the drop in pay was lawful.

Marah also testified that the next day, February 19, Kenneth Kacy, the general manager, called him at home to tell him he was being laid off. "He told me that I was laid off due to a lack of work, a slowdown, and he was going to have to cut back on the night shift and I was the first one to go and that I didn't understand about the wage concessions and he had to get rid of me." Marah's response was only to ask could he have a layoff slip; he was told to pick it up on Monday. On Monday, still according to Marah, Ray Williams, the plant superintendent, gave him his layoff slip, it read:

> Due to the current economic conditions, we are forced to institute immediate layoffs. We hope that soon, the economy will begin to improve, and we will therefore be able to call our laid off employees back to work.

In this conversation, with Williams repeating that the layoff was because of lack of work, Marah said: "If you read between the lines, it is because I was behind organizing the Union here and I had people sign cards." When Williams asked how did Marah know that Williams knew of Marah's union activity, the employee said because another employee, Scott, had told Marah that Kenneth Kacy asked what did he think were the chances of the union campaign succeeding. With this, Marah said he would "go to the Labor Board" about it. Williams then consulted with someone on the telephone and told Marah he could continue at work as usual. Marah worked that night, his regular shift, and then just took off for the rest of the week on his own for personal reasons. He never lost a moment's work.

I make no finding that the Respondent that day committed an unfair labor practice because it "decided upon"—but did not—lay Marah off, as alleged in the complaint. It did not hurt him at all, and all the supervisor said was he was being laid off for lack of work. Unfair labor practices are not "read between the lines," in such a situation. It was the employee who first spoke about union activities in that conversation. And if, when considering Marah's implied threat to accuse the Company of wrongdoing, the Respondent chose to avoid any kind of legal dispute, by taking back the layoff slip, it acted correctly, rather than unlawfully.

Marah continued to testify that when he returned, a week later, Al Kacy, the owner, talked to him at his workplace. "He told me that he knew I was behind it and he wanted to know how many people had signed cards and I wouldn't tell him. . . . He told me did I want to see the men lose their jobs, and I said no. He said, 'Well, if the union comes in, they will, and we'll close the shop down . . . We will all lose our jobs. Do you want that? . . . I don't need this. I don't want a union in here. I'm not going to have it. Anything but a union.'"

James Gordon, also an employee, testified that in early March Al Kacy asked him also had he signed a union card and he answered, "Yes." Another employee, John Ursul, also testified he had a number of talks with the owner of the Company that same day late in February or early March. "He walked up to me and asked me if Ray Marah had approached me to sign a card? . . . I told him, 'What does it matter?' He said, 'Did you sign a card with Ray Marah?' I said, 'It's really none of your business, leave me alone,' and he got insistent and he said, 'Did you sign a card?' I said, 'Yes, I did.' . . . He went down to say, 'What did you do this for? What do you think it's going to give you? Why do you have to do this to me. You don't have to do things like this, I don't need this . . . I can close the shop. You could lose your job. We'll all be standing in the unemployment line.' This went on for 45 minutes."

Al Kacy, testifying for the defense, did not directly contradict this testimony about his interrogation of employees and threats to close the entire business down in retaliation. He spoke of conversations with Marah, giving different versions of their talk. Perhaps his purpose was to deny having made the threats and asking improper questions, but this is not what he actually did on the stand. Certainly he did not contradict the testimony of Gordon and Ursul. In any event, even if Kacy intended, by his oblique testimony, to contradict the others, I do not credit his intended denials. He was not a convincing witness on the subject of his union talks.

For example, at one point he said he had a talk with Marah about March 5. From his testimony: "He said he had to do this because they cut our wages 7-1/2 percent. I said, pretending that I didn't know what it was all about, 'Doing what?' He said, 'Well, we had to settle this because they were segregating us out and cutting our wages 7-1/2 percent and we just had to do something.'" By this time Kacy had received the Union's demand letter of February 15, and he certainly must have known about Marah's telling Williams about his union activity. It follows he *knew* what he was *pretending* not to know, and it is that Marah was talking union with him. This sort of evasive testimony will not do. It appears again in his continuing testimony:

> Q. You had a conversation in March of '82 with Ray Marah about the union, right?
>
> A. Yes. . . . The first time around the 5th of March or thereabouts. The second time I would say about the 25th or 24th of March. . . . He told me that they had to do it, whatever they meant by 'it,' because we cut in the wages of 7-1/2 percent; that they had to do it for economic reasons. . . .
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> Q. Did you know at that time that he was involved in the union?
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> A. No.
>
> Q. In March?
>
> A. Not just then yet. In a few days I did, but not just then yet.

There can be no question but that Kacy knew what "it" was when talking to Marah. To say he did not know then that the man was involved with the Union did not enhance his testimony.

I find that by Al Kacy's questioning of Marah as to how many people had signed union cards, by his statement that he would close the plant to stop the prounion campaign, by his interrogation of Gordoni as to whether he had signed a union card, by his like questioning of Ursul, and by his repeated statements to Ursul that he would close the plant before having a union there, the Respondent violated Section 8(a)(1) of the Act.

C. *Seniority*

On April 27 the Company posted a notice on the plant bulletin board announcing that on April 29 four employees would be laid off, and on April 30 two more, "Due to lack of work." The six names were listed in order of their accumulated seniority—the one with the least seniority at the top and the one with the most being last on the list of six names. Marah's name was second on the list, and he was in fact laid off on the April 29. The first man—Gordon—was laid off 3 days later, on May 2. The management witnesses explained this as necessitated by surprise changes in orders from purchasers of its products. Michael Gaddes, Stanislaw Rusnak, and Harry Wills, third, fourth, and fifth on the seniority list, were not laid off until June 30, also because, according to uncontradicted testimony, unexpected work had to be finished.

That massive reduction in the employee complement, far more than half the total group, was necessitated by the decline in the volume of work is not disputed. Indeed there are company records received in evidence by stipulations which prove the fact beyond question. Absent any issue on the point—economic necessity for the layoffs—there is no need to burden this record with its details. The theory of illegality in the placement of Marah's name on the posted layoff list is based solely on the assertion that his true seniority at that moment went back to 1976, long before the seniority date of the other five men scheduled for layoff then. Marah had returned to work here, after an earlier quit, in 1976. At the end of June 1981 he accepted a job at the plant of a competitor of the Respondent. On the layoff slip posted the following April his seniority date is given as July 1981, when he came back again after leaving the competitor to work here for the Respondent. Is it true the Respondent gave Marah a new seniority date to create a pretext to cover its illegal purpose of getting rid of him because he was active in the pro-UAW drive? I think not.

Months before the summer of 1981 Marah learned from a friend, Lewis Vidra, vice president of a company called Viking Tool, that that company was going to acquire new machines designed to produce the same products Marah worked on for the Respondent. Vidra told him he would consider hiring Marah as a supervisor when that happened. Three weeks before June 22, 1981, Vidra told him the new machines were about to arrive and that he wanted Marah to come to his company. After learning this, Marah told Kenneth Kacy, son of the owner, he was going to take a vacation at an uncertain date in the near future, but was not sure just when; he asked to be paid his vacation pay already earned in advance. He explained the precise date for his vacation would be determined by the arrival of his father from Florida, a date he was not certain of. The Company gave him the money—$840 on May 10 and $840 on May 24—each payment the equivalent of 1-1/2 weeks' pay. Marah then again heard from Vidra, telling him the new machines had arrived.

On the last of his scheduled workdays the week of June 19, he took his tools with him when he left the plant, and the following Monday morning, June 22, reported for work at the Viking Company. He filled out an "Application for Employment," on which he listed, among other things, his "former employer" as K-C Machine and Tool Company. He was paid 40 cents per hour more than he had been earning at the Respondent.

By 9 a.m. Monday, Al Kacy had learned where Marah was and what he was doing. There is conflicting testimony as to just how he learned, exactly who told him, but that question is of no moment at all. Kacy arrived at the plant very early in the morning, as he usually does, saw Marah's toolbox empty and his machine unattended when it should have been producing. This much cannot be doubted, for Marah admitted that when he went off "on vacation," he did not tell anybody he was not going to be in on Monday. It ended with Kacy telephoning the Viking Company and hearing Vidra, whom he knew, tell him Marah had quit K-C Tool and accepted permanent employment at Viking. Kacy became very angry, even faulting Vidra for stealing employees from a competitor.

In fact, Vidra defended himself from that charge by repeating that Marah had voluntarily quit his old job to accept a new one.

I find it unnecessary to decide the credibility question between Carol Marah, the employee's wife, and Jannie Roger, the Respondent's office comptroller, who said she telephoned Marah's house and learned from his wife that he had quit and gone to work at Viking. The lady insisted, at the hearing, she only said she did not know where her husband was that day. She was corroborated, according to the General Counsel, by her husband, who testified he told his wife to keep the matter secret. Were I to believe him, it would put his total position in this case in a still poorer light. If, as he kept repeating at the hearing, a man has an absolute right to do as he pleases when on vacation, why did he feel he had to conceal from his Employer the fact he went to work for a competitor? Mr. Marah was not a convincing witness.

For reasons which were not made clear Marah returned to the Respondent's plant to work after doing only 1 week at Viking, although his planned vacation—as he himself noted on the wall calendar in the plant before leaving—was supposed to be for 3 weeks. He made no mention of his father ever arriving from Florida. Despite a disagreement between Al Kacy and his son, the Respondent decided to take him back.

Holding in abeyance the question whether it was right, objectively and entirely apart from any union sentiment, for the Respondent to deem Marah a new employee when he returned to work in June 1981, it is important to note the fact that the Company made the decision to start his seniority anew long before there was any union activity by anybody in the plant. The defense witnesses said clearly they established, and recorded, his new seniority date as of early July 1981. Marah repeatedly spoke to the contrary, but there is much in his testimony indicating he was told, back in 1981, he had lost his accumulated seniority. For example:

> Q. . . . You did come back to work for Kacy?
> A. Yes.
> Q. Were you required to fill out a new application?
> A. No.
> Q. Did the Company give you any memorandum telling you that you had lost your seniority because you had quit?
> A. No.
> Q. Did anyone tell you verbally that you had quit, a member of management at that time?
> A. Yes, Al Kacy, that as far as he was concerned I had quit.

Continuing his questioning of the witness, the General Counsel then had him change his testimony by asking:

> Q. Is that when you returned to work? I'm talking about when you returned to work now after your vacation.
> A. No.
> Q. Nothing verbally was said to you?
> A. No.

After he had worked the full day at the Viking Company, and after learning of the Respondent's resentment of his having gone with a competitor, Marah went to the home of a fellow employee, Scott, that night. Again from his direct testimony:

> Q. Would you briefly tell the Court the essence of that conversation?
> A. I told him that I hadn't quit. I couldn't understand why he [Al Kacy] would say that I quit. I had a notation marked on the calendar when I was going to leave on vacation and return. I would come back to work for him after the 3 weeks were up. Please tell him I haven't quit and I'll be back. He [Scott] said he would relay the message to him [Al Kacy].

Toward the end of the week, all of which he spent working for Viking, Marah came to the plant and talked to both Kenneth and Al Kacy. Quoting Al Kacy: "He told me that he didn't like it because I went to work at Viking working for a competitor of his while I was on vacation, and as far as he was concerned I had quit. If I was going to do any work at all in the industry I should do it for him and not do it for his competitor and if I wanted to work on my vacation and work a few days throughout the following weeks in his shop."

When he saw the posted list of employees to be laid off on April 27, 1982, with his seniority starting only in July 1981, Marah went to talk to the comptroller about it, to argue against such limited seniority. He spoke to Al Kacy instead that day in the office. Again from his testimony:

> Q. Al Kacy told you it was because you had 10 months' seniority?
> A. Right, and he was the one that wrote the list out. It was in his handwriting.
> Q. Was that the first time that you were aware that you had only 10 months seniority?
> A. No, he had made me aware of that before. He told me that before.

With all this from Marah himself, direct admission that he had lost his seniority in 1981, I must credit the testimony of Al Kacy that when Marah returned to work at his place, he, Kacy, told him, "It's too bad you lost your seniority." I also credit the testimony of comptroller Rogers, with whom Marah also had a talk on his return. "He came upstairs and he asked me if I knew he had been rehired and I said no. He said, 'The old man . . . meaning Al Kacy . . . hired me.' He said, 'I wanted to make sure that you know and I was rehired at the same rate I had which was $14.' I said, 'all right, I will check with him,' and I put it down on the payroll record. He was concerned because the man that we had hired to replace him was making $2 less an hour than he was. He also wanted to check and see about the Blue Cross because he had quit, would there be a lapse in the Blue Cross coverage, and I explained that there would not be because in this particular case his coverage could not have ended until the 28th of the month by our contractual terms with Blue Cross. Because he was going to be

employed prior to that date, he would be a new employee but he would still be covered and there would not be a lapse of his insurance."

Marah was recalled as a rebuttal witness after Rogers had testified. He did not contradict her story about his concern when he was rehired. What better proof could there be that he knew, when returning from the Viking Company, he was being hired as a new employee? An employee on vacation is not in danger of losing his insurance coverage. With this, I also find reliable an entry noted on his record saying he was "rehired 7-3-81."

I find that the Respondent laid off Marah because economic necessity demanded it, that it chose him solely on the basis of seniority, that it would have acted as it did regardless of any of his other activities, and that the evidence in its entirety does not prove any illegal motive. I shall therefore recommend dismissal of the complaint as to him.

IV. THE EFFECT OF THE UNFAIR LABOR PRACTICES UPON COMMERCE

The activities of the Respondent set forth in section III, above, occurring in connection with its operations described in section I, have a close, intimate, and substantial relationship to trade, traffic, and commerce among the several states, and tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce.

CONCLUSIONS OF LAW

1. By interrogating employees concerning the signing of union cards by themselves or by other employees, and by threatening to close down its business in retaliation for the union activities of its employees, the Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(1) of the Act.

2. The above-described unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended

ORDER[1]

The Respondent, K-C Machine & Tool Company, Detroit, Michigan, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Interrogating employees concerning their activities in signing union cards or the activities of other employees in signing union cards.

(b) Threatening to shut down its business in retaliation for the union activities of its employees.

(c) In any like or related manner interfering with, restraining, or coercing its employees in the rights guaranteed in Section 7 of the Act.

2. Take the following affirmative action which is deemed necessary to effectuate the policies of the Act.

(a) Post at its Detroit, Michigan place of business copies of the attached notice marked "Appendix."[2] Copies of the notice, on forms provided by the Regional Director for Region 7, after being signed by the Respondent's representative, shall be posted by the Respondent immediately upon receipt and maintained in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by it to ensure that said notices are not altered, defaced, or covered by any other material.

(b) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

[1] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[2] If this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found, after a hearing, that we committed unfair labor practices under the Federal Law.

WE WILL NOT interrogate our employees concerning their signing union cards or the activities of other employees in signing union cards.

WE WILL NOT threaten to shut down our business in retaliation for the union activities of our employees.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of the rights guaranteed them by Section 7 of the National Labor Relations Act, as amended.

K-C MACHINE & TOOL COMPANY